

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL APPEAL No. 705 of 1986****For Approval and Signature:****HONOURABLE MR.JUSTICE C.K.BUCH**

Sd/-

HONOURABLE MR.JUSTICE K.A.PUJ

Sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

STATE OF GUJARAT - Appellant**Versus****DAHABHAI JASING & 1 - Opponents****Appearance :**

MR KT DAVE, APP for Appellant.

MR G RAMAKRISHNAN for Respondents.

CORAM : HONOURABLE MR.JUSTICE C.K.BUCH**and****HONOURABLE MR.JUSTICE K.A.PUJ**

Date : 17/07/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE K.A.PUJ)

- 1.The State has filed this appeal under Section 378 (1) (3) of the Code of Criminal Procedure challenging the judgment and order dated 15.03.1986 passed by the learned Additional Sessions Judge, Surat in Sessions Case No. 118 of 1985 acquitting both the accused from the charges and offences punishable under Sections 302, 452 & 114 of Indian Penal Code.
- 2.The case of the prosecution is that on 23.08.1985 at about 09.00 p.m. when deceased Savitaben was in her house, Dahyabhai Jesing and his wife Ramilaben, the respondents - orig. accused herein, entered in the house of the deceased Savitaben and started abusing the deceased. Deceased Savitaben has also started abusing the accused Nos. 1 & 2. Because of the extensive quarrel between them, the accused No. 1 Dahyabhai has gone to

his house which is adjoining to the house of the deceased and brought a kerosene tin and he poured kerosene on the deceased Savitaben and the accused No.2 Ramilaben has ignited the match because of which the deceased Savitaben has got extensive burns on her body. Both the accused have thereafter closed the door of the house of the deceased from outside and went away. Deceased Savitaben has thereafter shouted for help. The accused thereafter opened the doors and deceased Savitaben ran out from her house in burning condition. Deceased Savitaben's husband Tribhovandas was informed thereafter and the deceased was taken to the hospital at Surat where Dr. Mevada has examined her and recorded the case history as stated by the deceased Savitaben. Dying Declaration of the deceased Savitaben was recorded by Executive Magistrate Shri Prashant Master and P.S.I. has registered the complaint of Savitaben wherein it was stated by her that Shri Dahyabhai poured kerosene on the deceased

Savitaben and the accused No.2 Ramilaben has ignited the match and because of which she got burn injury. Because of this burn injury, deceased Savitaben expired on 28.08.1985.

3.After commission of the case to the learned Sessions Judge and after examining and evaluating the oral as well as documentary evidence recorded during the course of trial, the learned Additional Sessions Judge, Surat has, vide his impugned judgment and order, acquitted both the accused.

4.Being aggrieved by the said judgment and order, the State has sought leave to appeal from this Court which was granted and appeal was admitted on 06.04.1987.

5.Mr. K.T. Dave, learned Assistant Public Prosecutor appearing for the State has taken us through the oral and documentary evidence which are on record and also assailed the

judgment and order dated 15.03.1986 of the learned Sessions Judge passed in Sessions Case No. 118 of 1985. He has submitted that the learned Trial Judge has erred in acquitting the respondents - accused though there are ample and cogent evidence to connect the accused with the crime. He has further submitted that three dying declarations given by the deceased Savitaben are in consonance with each other and there was no material difference nor any inconsistency between them. Despite this fact, the learned Trial Judge has erroneously rejected all the three dying declarations and acquitted the respondents - accused. Mr. Dave has further submitted that the learned Trial Judge has graveously erred in not relying upon the dying declaration given by deceased before Dr. Mevada who has stated in her evidence that he had taken history of the case from deceased which was noted down in the outdoor case papers. He has further stated that at that point of time, the

deceased was fully conscious and was able to speak. In this dying declaration, the deceased has clearly stated that accused No. 1 poured kerosene on her and accused No. 2 set her on fire with match box and thereafter both of them left the house by closing door from outside. Mr. Dave has further submitted that since Dr. Mevada being an independent witness, has no grudge against the respondents - accused, nor have any interest in involving them in a serious charge of murder. He has further submitted that the deceased has repeated the same story before the Executive Magistrate, Mr. Prashant Master who has recorded the dying declaration on the same day. He is also an independent witness and has no grudge against the respondents - accused. The deceased has also narrated the incident in her complaint recorded by P.S.I. which turned out to be a dying declaration. Mr. Dave has, therefore, submitted that when the deceased has made three dying declarations and she was fully conscious and

was able to speak, the learned Trial Judge should have relied upon the said dying declarations and should have convicted the respondents - accused. Mr. Dave has further submitted that the dying declaration before the doctor was made immediately after the incident and hence, there was no question of doubting the deceased. The law relating to dying declaration is well settled by now and when there is no infirmity in the dying declaration and the persons before whom such dying declarations are made are independent persons, the same should not have been brushed aside merely on the basis of some minor omissions or contradictions. The learned Trial Judge has taken into consideration certain irrelevant facts while appreciating the evidence of three dying declarations and has not relied upon them which has resulted into miscarriage of justice. He has, therefore, submitted that the reasons given by the learned Trial Judge in acquitting the respondents - accused are

perverse and are not borne out from the record of the case and hence, the order of acquittal passed by the learned Trial Judge deserves to be quashed and set aside and the respondents - accused are required to be convicted.

6. Mr. G. Ramakrishnan, learned advocate appearing for the respondents - accused, on the other hand, has supported the judgment and order of the learned Trial Judge and submitted that the learned Trial Judge is completely justified in acquitting the respondents - accused and the view taken by the learned Trial Judge is in consonance with the settled legal position. The legal position is well settled in respect of the acquittal appeal and the role of the appellate Court while deciding the said appeal. The Court has taken consistent view that even if the other view is possible, the appellate court should not substitute that view in place of the view taken by the

learned Trial Judge if it is not perverse and there is no serious infirmity in forming such view. The witnesses residing near the house of the deceased have not supported the case of the prosecution and all of them have stated that the deceased Savitaben has herself got burn injuries. According to him, it was a case of suicide and not a case of culpable homicide or murder. Even the husband of deceased Savitaben has not supported the case of the prosecution and he has stated in his deposition that deceased Savitaben has told him that she has herself set her on fire. There are lot of contradictions and inconsistencies between the mode and method of dying declarations. Though the Certificate issued by Dr. Joshi clearly states that the case history was recorded as per the say of the relatives, the same was not found in the case papers nor in the deposition of Dr. Mevada. He has further submitted that Entry No. 14 - Exh. 32 also does not refer to the fact that the respondent - accused No. 1

Dahyabhai Jasing has poured kerosene on the deceased and the accused No. 2 Ramilaben has ignited the match and set the deceased on fire. The dying declarations have not been corroborated by other evidence and the deceased was not in a conscious state of mind to give such dying declarations. He has lastly submitted that even if it is assumed that Dr. Mevada, the Executive Magistrate and the P.S.I. are considered to be independent persons, in absence of any corroborative evidence and more particularly there being many omissions, contradictions and infirmities, such dying declarations should not be accepted for the purpose of linking the accused - respondents with crime and, therefore, the learned Trial Judge has rightly acquitted the accused.

7.Mr. Ramakrishnan has relied on the judgment of the Hon'ble Supreme Court in the case of **Smt. Laxmi V/s. Om Prakash and others, AIR 2001 SUPREME COURT 2383** wherein it is held

that one of the important tests of the reliability of the dying declaration is a finding arrived by the Court as to satisfaction that the deceased was in a fit state of mind and capable of making a statement at the point of time when the dying declaration purports to have been made and/or recorded. The statement may be brief or longish. It is not the length of the statement but the fit state of mind of the victim to narrate the facts of occurrence which has relevance. If the Court finds that the capacity of the maker of the statement to narrate the facts was impaired or the Court entertains grave doubts whether the deceased was in a fit physical and mental state to make the statement the Court may in the absence of corroborative evidence lending assurance to the contents of the declaration refuse to act on it. The Hon'ble Supreme Court has further held that the dying declaration is admissible in evidence. The admissibility is founded on principle of

necessity. A dying declaration, if found reliable can form the basis of conviction. A court of facts is not excluded from acting upon uncorroborated dying declaration for finding conviction. A dying declaration, as a piece of evidence, stands on the same footing as any other piece of evidence. It has to be judged and appreciated in the light of the surrounding circumstances and its weight determined by reference to the principles governing the weighing of evidence. It is, as if the maker of the dying declaration was present in the Court, making a statement, stating the facts contained in the declaration, with the difference that the declaration is not a statement on oath and the maker thereof cannot be subjected to cross-examination. If in a given case, a particular dying declaration suffers from any infirmities, either of its own or as disclosed by other evidence adduced in the case or circumstances coming to its notice, the Court may as a rule of prudence look for

corroboration and if the infirmities be such as render the dying declaration so infirm as to prick the conscience of the Court, the same may be refused to be accepted as forming safe basis for conviction. The Court also took the view that it is not the number of dying declarations which will weigh with the Court. A singular dying declaration not suffering from any infirmity and found worthy of being relied on may form the basis of conviction. On the other hand if every individual dying declaration consisting in a plurality is found to be infirm, the Court would not be persuaded to act thereon merely because the dying declarations are more than one and apparently consistent.

8. Based on the aforesaid judgment of the Hon'ble Supreme Court, Mr. Ramakrishnan has strongly urged that even if there are three dying declarations, the same are rightly ignored by the learned Trial Judge as each one of three dying declarations suffers from

many infirmities and none can ever be formed safe basis for conviction.

9. After having heard learned advocates appearing for the respective parties and after having examined and evaluated the oral as well as documentary evidence which are forming part of the paper book and after having minutely gone through and considered the impugned judgment and order and the authority relied upon by the learned advocate appearing for the respondents - accused, we are of the view that the impugned judgment and order passed by the learned Trial Judge does not call for any interference while exercising our appellate powers and the same deserves to be confirmed. The reason for arriving at such conclusion are summarised as under :-

10. Prosecution has examined Dhanuben as P.W.5 - Exh. 16. She has stated in her deposition that on the day of incident i.e. 23.08.1985,

she had seen Savitaben coming out from her house in burning condition. She poured water on her and fire was put off. She has referred to the quarrel between deceased Savitaben and accused No. 2 - Ramilaben and there was heavy exchange of abusive words. She has also stated that deceased Savitaben was conscious and she did not tell anything to Niruben. This witness was declared hostile as it did not support the case of the prosecution. For the reasons best known to the prosecution, Niruben was not examined.

11.Prosecution has examined Jashuben as P.W.6 - Exh. 17. She was not present at the time of incident. However on her arrival, she saw deceased Savitaben coming out from her house in burning condition. Since all clothes of Savitaben were burnt, she put on her chaniya on Savitaben. She has also stated that deceased Savitaben was fully conscious. However, she has not supported the case of the prosecution. She has also confirmed that

deceased Savitaben has not uttered any word in her presence. The I.O. has not recorded her statement on 23.08.1985. Despite the fact that this witness has not supported the case of the prosecution, she was not declared hostile.

12.Prosecution has also examined Revaben P.W.7

- Exh. 18 as witness. She has stated that when she was in her house, she came to know that deceased Savitaben has herself set on fire. She has seen the deceased Savitaben in burning condition and at that time, she was fully conscious. She did not utter any word before her and after that her husband took deceased Savita to hospital. This witness was also declared hostile. In her cross-examination, she has stated that Dhanuben has asked deceased Savitaben as to what she has done and in reply to the said question, she has stated that she has herself set her on fire. At that time, Dahyabhai and Ramilaben were sitting in Jashuben's house.

13. Prosecution has examined Tribhovan Rama, the husband of the deceased as P.W. No. 11 – Exh. 27. He has stated in his deposition that in rickshaw, deceased Savitaben has told him that Ramilaben was quarreling with her and she could not tolerate it and hence, she has herself poured kerosene on her and set her on fire. He has further stated that deceased Savitaben has told him that it is a misfortune and whatever was to be done was done. This witness was also declared as hostile. He did not support the case of prosecution. In his cross-examination, he has stated that in his presence, doctor did not ask any question to deceased Savitaben. He has further stated that right from the moment he took Savitaben in the hospital till she became completely unconscious, no question was asked by the doctor to her.

14. None of the aforesaid witnesses has supported the case of the prosecution and

story which emerged from these statements reveals that deceased Savitaben has committed suicide by pouring kerosene on her and no one else was responsible for her death.

15. The case history was recorded by Dr. Mevada.

He has stated in his deposition that deceased was fully conscious and was in a position to speak. According to him, deceased Savitaben has told that Dahyabhai poured kerosene on her and Ramilaben ignited the match and thereafter they closed the door from outside and went away. This story unfolded by Savitaben before the doctor did not find any corroboration from other witnesses staying near the house of deceased Savitaben. It is also contrary to the certificate given by Dr. Soni Exh. 9. In this certificate, it is stated that the case history was recorded as stated by the relatives. Dr. Mevada has tried to explain this contradiction by stating that it was merely a mistake. However, it did not inspire the

confidence of the Court especially when Dr. Soni was not examined by the prosecution. As per the say of Dr. Mevada, burn injury was to the extent of 95% to 100% and it was first and second degree burn. Dr. Mevada has also admitted that generally 95% to 100% burn injury may be found in the case of suicide and not when somebody else is trying to pour kerosene and set her on fire. In view of these peculiar circumstances, the dying declaration recorded by Dr. Mevada creates doubt and suspicion and though he is an independent witness and no grudge against the respondents - accused, it is difficult to accept this dying declaration and his statement which would lead the Court to believe that the respondents - accused have committed crime.

16.The dying declaration recorded by Mr. Prashant Master, Executive Magistrate is more or less on the same line. However, at this time, deceased Savitaben was under the

influence of medicines given to her and she was in sedation. It is, therefore, difficult to believe that she was in conscious state of mind in stating true and correct facts.

17. Station Diary Entry No. 14 – Exh. 32 reveals that because of the quarrel with Dahyabhai Jasingbhai, Savitaben poured kerosene and she was seriously burnt and her husband Tribhovan has taken her to the hospital. The fact stated in this entry is in contradiction with the complaint recorded by P.S.I., Exh. 22 as in the Station Diary Entry No. 14 it is not stated that Dahyabhai has poured kerosene on Savitaben and Ramilaben has set her on fire. The Executive Magistrate Mr. Master in his deposition has stated that both the hands of Savitaben were heavily burnt and she was not in a position to sign or to put her thumb impression on dying declaration. Looking to this, it is difficult to believe as to whether Savitaben was in a position to put her thumb impression on the complaint Exh. 22

recorded by P.S.I. It, therefore, appears that there is contradiction between the statements of the Executive Magistrate as well as P.S.I.

18.The prosecution has recorded the statement of Dr. Mevada, Dr. Choksi and Dr. Bhatt of Maskati Hospital. All these three persons are independent witnesses and there is no reason to believe that they have not given correct versions on oath. However, looking to the medical evidence found on record, more particularly when the burn injury of deceased Savitaben was to the extent of 95% to 100% and it was first and second degree burns, it can hardly be believed that deceased Savitaben was in conscious state of mind to give such statements. One can also be led to believe that because of the earlier quarrels between the deceased Savitaben and Ramilaben, she might have involved Ramilaben and her husband Dahyabhai.

19.It is also difficult to believe that Dahyabhai has gone to his house, brought kerosene tin and entered again in the house of deceased Savitaben and poured kerosene on her. It is also difficult to believe that both of them have again entered in the house of Savitaben and poured the water on her. If they really intended to set Savitaben on fire, there was no reason for them to come again and pour water on her. There appears to be no resistance from Savitaben's side which leads the Court to believe that it might be a case of suicide and not homicidal death.

20.As per the statement of Tribhovan, husband of deceased Savitaben, she has herself set her on fire and no one else, much less, Dahyabhai Jesing has poured kerosene on her. She has admitted before her husband that she poured kerosene on her. There was no reason for the husband to give false statement especially when her wife died because of the burn injury and as per the case of the

prosecution, the respondents - accused were liable for commission of such offence.

21.From the foregoing facts and discussions, the Court is of the view that the prosecution has not satisfactorily proved the case against the respondents - accused. The learned Trial Judge has come to the just and proper conclusion in acquitting the respondents - accused. There is no reason for this Court to interfere with the finding arrived at by the learned Trial Judge after proper appreciation of all the oral as well as documentary evidence. The prosecution has failed to establish the link between the involvement of the accused and commission and crime and on this fact, it is difficult to link the accused with crime. The respondents - accused are, therefore, rightly acquitted by the learned Trial Judge.

22.The reasons recorded by the learned Trial Judge are logical and there is no element of

perversity or patent illegality. The Apex Court in a decision in the case of **Dwarkadas V/s. State of Haryana, reported in (2002) SCC 204**, has reiterated the principles of law where it has been held that the judgment and order of acquittal normally should not be reversed merely because the other view is possible. In the same way, the observations of the Apex Court in the case of **Kashiram V/s. State of Madhya Pradesh (Re. Para-21), reported in AIR 2001 SC 2902**, in respect of appeal against the order of acquittal, positively would help the accused. As per the settled legal position, while appreciating the order of acquittal, the Court should go slow in reversing the order of acquittal unless the order is absolutely illegal and perverse.

23. In view of the ratio of the above cited decision and the discussion made hereinabove, the present appeal stands dismissed.

[C.K. BUCH, J.]

[K.A. PUJ, J.]

Savariya